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No.: 86-1579

IN THE

Supreme Court of the United States

October Term, 1986

MATTHEW IANNIELLO, BENJAMIN COHEN,
ALFRED IANNIELLO, MORTON WALKER,
BERNARD KURTZ, CARL MOSKOWITZ
and SOL GOLDMAN,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY FOR PETITIONERS MATTHEW IANNIELLO, BENJAMIN COHEN, ALFRED IANNIELLO, MORTON WALKER, BERNARD KURTZ, CARL MOSKOWITZ, and SOL GOLDMAN

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This reply is submitted on behalf of petitioners in response to the brief filed by respondent United States opposing petitioners' petition for certiorari. We respond briefly to correct two assertions made in respondent's brief.

First, in response to our challenge to the district court's jury instructions on the RICO "pattern" element, respondent asserts that the claim was not properly preserved. (Resp. Br. at 11). This claim should be rejected out of hand. Indeed, the very transcript pages cited by respondent in support of its argument make crystal-clear that petitioners' claim was fully preserved. At a charging conference held pursuant to Rule 30, Fed. R. Crim. P., the following colloquy took place:

> [DEFENSE COUNSEL]: Page 42, your Honor, the third sentence of the second paragraph, "You need not find any connection or interrelation between the racketeering acts," we submit that that is an incorrect statement of the law in light of the Sedima case in the Supreme Court which says that the racketeering acts must and *in order for there to be a pattern there must be some relationship upon* [*sic*] *them.*
>
> THE COURT: What is the case you are relying upon?
>
> [DEFENSE COUNSEL]: It is the Sedima case in the Supreme Court.
>
> THE COURT: What is the citation?
>
> [DEFENSE COUNSEL]: I have it right here. It is 105 Supreme Court 3275 at 3285, *note 14.*

(Tr. 2226) (emphasis added). This colloquy was plainly sufficient to alert the district court of the specific nature of the defense objection, as well as the precise legal authority on which the objection was based.

Second, respondent attempts to downplay the circuit split with respect to the "pattern" element, suggesting that there is no "sharp divergence" between the decision of the Second Circuit in this case and the approach adopted by the Eighth Circuit. (Resp. Br. at 7; *see also* Resp. Br. at 8 (alluding to "alleged conflict" in the circuits)). This contention is quite simply incorrect; the divergence of opinion in the circuits could not be clearer.

In this case, the court of appeals, after discussing the legal elements necessary to constitute a RICO "pattern," explicitly stated:

> The Eighth Circuit has adopted a contrary view in *Superior Oil Co.* v. *Fulmer,* 785 F.2d 252 (8th Cir. 1986) . . . . That circuit now requires as part of the definition of pattern proof that the defendants engaged in more than one scheme. We conclude that forcing such a result from the word "pattern" is a strained and inappropriate reading of the statutory language.

Petitioners' Appendix at 15 (citations omitted); 808 F.2d at 192. Indeed, three distinct lines of authority have arisen in the wake of the *Sedima* decision: the strictly numerical approach adopted by the Second Circuit in this case; the "separate schemes" approach, as illustrated by the Eighth Circuit's decision in *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (1986); and a "middle of the road" approach that focuses on the totality of the circumstances, *see e.g., Morgan v. Bank of Waukegan,* 804 F.2d 970, 973-77 (7th Cir. 1986) (reviewing divergent authority in other circuits and adopting totality of the circumstances approach). This Court's *Sedima* decision has led to widespread disarray in the circuit and district courts over the proper definition of the "pattern" element of the RICO statute, and review in this case would allow the Court to remedy this confused situation with a definitive holding.

Respectfully submitted,

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